

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

DAVID RAY EVANS

PLAINTIFF

v.

Civil No. 2:07-cv-02040

JUDGE J. MICHAEL FITZHUGH,
Circuit Judge; CLAIRE LOUISE
BORENGASSER, Senior Deputy
Prosecutor; and UNITED STATES
MAGISTRATE JUDGE JAMES
R. MARSCHEWSKI

DEFENDANTS

REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE

Plaintiff, David Ray Evans, filed this civil rights action pursuant to the provisions of 42 U.S.C. § 1983. He proceeded *pro se* and *in forma pauperis*. Pursuant to the provisions of 28 U.S.C. § 636(b)(1) and (3)(2007), the Honorable Robert T. Dawson, United States District Judge, referred this case to the undersigned. Before me for report and recommendation is the Plaintiff's motion for leave to appeal in forma pauperis (IFP) (Doc. 11).

On April 20, 2009, I issued a report and recommendation (Doc. 4). It was recommended that the case be dismissed prior to service of process because the claims asserted were frivolous, failed to state claims upon which relief could be granted, and sought relief against Defendants who were immune from suit. *See* 28 U.S.C. § 1915(e)(2)(B)(i)-(iii) (IFP action may be dismissed on such grounds at any time). The report and recommendation was adopted by United States District Judge Robert T. Dawson on May 12, 2009 (Doc. 6). Plaintiff filed a notice of appeal on May 27, 2009 (Doc. 10). In the notice of appeal he indicates he is appealing from the order entered by United States District Judge Dawson dismissing his complaint.

Plaintiff has filed a motion for leave to appeal IFP (Doc. 11). Pursuant to 28 U.S.C. § 1915(a)(3) “[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.” In this case, any appeal would be legally frivolous. *Neitzke v. Williams*, 490 U.S. 319, 325, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989).

I therefore recommend that the motion for leave to appeal be denied as the appeal is not taken in good faith, 28 U.S.C. § 1915(a)(3). I further recommend that the clerk be directed to collect the \$455 filing fee pursuant to the terms of the Prison Litigation Reform Act. Plaintiff may, of course, renew his motion for leave to appeal IFP with the Court of Appeals for the Eighth Circuit. Fed. R. App. P. 24(a).

Evans ten days from receipt of the report and recommendation in which to file written objections pursuant to 28 U.S.C. § 636(b)(1). The failure to file timely objections may result in waiver of the right to appeal questions of fact. Evans is reminded that objections must be both timely and specific to trigger de novo review by the district court.

DATED this 11th day of August 2009.

/s/ Barry A. Bryant
BARRY A. BRYANT
UNITED STATES MAGISTRATE JUDGE